No. 70-5039

IN THE

Supreme Court of the United States

OCTOBER TERM, 1970

No. ~~6060~~ 70-5039

MARGARITA FUENTES, individually, and as a class for all those similarly situated,

Appellant,

v.

ROBERT L. SHEVIN, Attorney General for the State of Florida, and FIRESTONE TIRE AND RUBBER COMPANY,

Appellees.

APPELLANT'S BRIEF

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OPINION BELOW

The opinion of the United States District Court for the Southern District of Florida, entered on August 21, 1970, is reported at 317 F. Supp. 954 (A. at 62).

JURISDICTION

The jurisdiction of this Court to review by appeal the decision of a three judge panel of the United States District Court for the Southern District of Florida is conferred by 28 U.S.C. § 1253.

The judgment of the court below was entered on September 8, 1970. Notice of Appeal to this Court was filed on September 29, 1970, and appellant's Jurisdictional Statement was filed on October 22, 1970, within the time provided for appeals by 28 U.S.C. §2101(c). This Court noted probable jurisdiction on February 22, 1971. 39 U.S.L.W. 3359.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This appeal involves the Fourth and Fourteenth Amendments to the United States Constitution and Sections 78.01, 78.08, 78.10, 78.11, and 78.12 of the Florida Statutes. The pertinent text of these Amendments and statutes along with closely related provisions of Chapter 78 are set forth in Appendix A, *infra* at 57.

QUESTIONS PRESENTED

I

Whether Florida's statutory replevin procedure, insofar as it authorizes the taking of personal property by state officers pursuant to a writ issued automatically by a clerk without judicial intervention, upon the filing of *ex parte* allegations that the claimant is entitled to the property and the posting of a bond in double the value of the property, without notice to a defendant and without providing an opportunity to challenge the validity of the claim, violates the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

II

Whether this statutory procedure, insofar as it authorizes state officers to enter and search private dwellings, by force if necessary, in order to seize and remove personal property therefrom, violates the Fourth and Fourteenth Amendments to the United States Constitution.

STATEMENT OF THE CASE

Appellant purchased a stove and service policy from the FIRESTONE TIRE AND RUBBER COMPANY (hereinafter FIRESTONE) in Miami, Florida, in June of 1967, and a stereophonic phonograph from the same store in December of that year. Both purchases were made under conditional sales contracts calling for monthly payments over a period of time and were consolidated into one obligation. On several occasions appellant complained to FIRESTONE about mechanical difficulties with the stove. She has asserted throughout this controversy that the stove's defects and FIRESTONE's failure to repair them constituted a breach of warranty entitling her to withhold payments. FIRESTONE has denied any failure to repair the stove. On September 15, 1969, FIRESTONE submitted a complaint and affidavit for replevin of the stove and stereo, together with a bond, to the Small Claims Court of Dade County, Florida. A prejudgment writ of replevin thereafter was issued by the clerk of that court without any judicial intervention and was executed the same day by a Deputy Sheriff of Dade County. Stipulation of Facts, A. 24-26.

The facts surrounding the execution of this replevin writ were disputed. Stipulation of Facts, A. 27-28. The Court below, viewing this dispute most favorably to appellant, found that the deputy came to appellant's home and while standing outside on her front porch attempted to explain his mission to appellant and her daughter-in-law who do not speak English. The daughter-in-law became upset and emotional upon learning that the deputy intended to take the stove and stereo and, keeping the deputy waiting on the front porch, telephoned appellant's son-in-law for assistance. Appellant's son-in-law left his place of employment and came to her home where he explained to the deputy in English that on his attorney's advice he was not going to relinquish the property until after a court proceeding. The deputy then "explained the effect of the writ . . . [and]

that he was obliged to repossess the stove and stereo in accordance with its terms." 317 F. Supp. at 956 (Stipulation of Facts, A. 28). At this point the deputy and two FIRESTONE employees who had been waiting outside appellant's home in a company truck entered the house and removed the stove and stereo. *See* 317 F. Supp. at 956 (A. 28-29).

Appellant brought suit in the Court below on November 29, 1969, and proceedings in the Small Claims Court were stayed by a Judge of the Small Claims Court pending the outcome of this suit. On August 24, 1970, the Court below entered its opinion. With one judge dissenting, the Court held that the Florida statutes authorizing prejudgment replevin neither contravened the Fourth nor the Fourteenth Amendments to the United States Constitution and denied appellant's request for injunctive and declaratory relief. Final judgment for appellees was entered on September 8, 1970. (A. 69-70).

SUMMARY OF ARGUMENT

I.A. The fundamental principle of due process of law is notice and a prior opportunity to be heard. *E.g., Boddie v. Connecticut*, 91 S.Ct. 780 (1971); *Goldberg v. Kelly*, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). These procedural requirements may be dispensed with only in extraordinary situations where valid state interests compel summary action. *Compare Bell v. Burson*, 39 U.S.L.W. 4607 (May 24, 1971) with *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950). The apparent approval by this Court in *Sniadach* of *McKay v. McInness*, 279 U.S. 820 (1928), does not vitiate the vitality of this general rule. *McKay* may not have involved a taking of property within the meaning of the Fourteenth Amendment since the attachment of the defendant's property in that case did not necessarily effect a total interruption of his interest. Moreover, *McKay*, a per curiam decision, was

decided on the authority of *Coffin Brothers & Co. v. Bennett*, 277 U.S. 29 (1928), and *Ownbey v. Morgan*, 256 U.S. 94 (1921), both of which dealt with special situations involving valid state interests.

B. Florida's statutes authorize the issuance of a prejudgment writ of replevin by a clerk of a court without judicial intervention to any person who alleges that he is entitled to possession of the property and posts a bond in double the value of the property. Fla. Stat. §§78.01, 78.07 (1969). No prior notice is given to a defendant, nor is he afforded any opportunity to protect his interest in the property by contesting the merits of the claim against him. This procedure is virtually identical to the Wisconsin garnishment statute invalidated by this Court in *Sniadach v. Family Finance Corp., supra.* And, as in *Sniadach*, the facts of this case do not present a situation requiring special protection of a state or creditor interest.

The Florida law does not require, nor do we have here, allegations that unless summary action is taken irreparable injury is likely to occur. There is no allegation, for example, that the property held by appellant was about to be destroyed or misued, or that appellant intended to convey it fraudulently or abscond from the state. In an ordinary dispute such as the present one, no reason of any kind has been advanced why the contractual rights of the creditor could not await the usual judicial determination before the power of the state was invoked. *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (1970) (New York's replevin laws invalidated). Moreover, even the history of the writ of replevin cannot support its present uses. At common law, replevin would lie only where there had been an unlawful taking, and not in cases such as this one, where possession by the replevin defendant had been lawfully acquired. *E.g., Simmons v. Williford*, 50 So. 452, 453 (Fla. 1910).

C. The deprivation suffered by appellant in the instant case is protected by the Fourteenth Amendment. The Due

Process Clause protects any significant or substantial right, or any taking of property which cannot be considered *de minimus. E.g., Boddie v. Connecticut, supra; Sniadach v. Family Finance Corp., supra.* Appellant here purchased the items replevied under a conditional sales contract which gave her the right to the exclusive use and possession of the goods absent a breach of her obligations to the seller. The taking of these items by writ of replevin deprived her completely of the rights for which she had bargained and had already paid approximately $400.00. Certainly, under these circumstances, she was deprived of a substantial property right, and although her loss may have only been temporary, it cannot be characterized as *de minimus. Sniadach v. Family Finance Corp., supra; Goldberg v. Kelly, supra.* The hardships occasioned when personal and household goods are replevied can be as severe as the ones present in those cases. *Laprease v. Raymours Furniture Co., supra; Hall v. Garson,* 430 F.2d 430 (5th Cir. 1970). And here too, the possibilities of economic leverage by the creditor and the abandonment of meritorious defenses are readily apparent.

D. The provision of the Florida law that permits a defendant to reclaim the seized property by posting, within three days, a bond in double the value of the property, Fla. Stat. §78.13 (1969), does not obviate the requirements of notice and hearing. Such a provision affords no protection to poor persons like appellant. Of 442 cases in 1969 examined by appellant's counsel in the Small Claims Court of Dade County, Florida, not one defendant had posted the redelivery bond. The "remedy" provided by the Florida law therefore does not cure the statute's unconstitutionality. *See Sniadach v. Family Finance Corp.,* 395 U.S. at 343. Similarly the bond required of a replevying plaintiff by Fla. Stat. §78.07 (1969) is not an adequate substitute for notice and hearing. The cost of such a bond is negligible and thus it does little to deter a claimant with a mistaken factual or legal opinion, or one who seeks to assert his claim fraudulently. Hence, the act of posting bond cannot be construed

as establishing the validity or at least the probable validity of the claim.

E. The holding of the court below that by executing the conditional sales contract appellant had waived her right to notice and hearing is clearly unsupportable. The language cited by the court from the contract, providing that "in the event of default in any payment or payments, seller at its option may take back the merchandise" (A. 34), describes merely the remedies available to the seller once the occurrence of a default is established. It does not support even an inference that appellant clearly and unequivocally waived her right to notice and hearing on the issue of default. See *Johnson v. Zerbst*, 304 U.S. 458, 464 (1938). Even if it were otherwise, the fact that this is a standard form contract and not the product of the parties' bargaining would render such a waiver highly suspect. *E.g., National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 326-27, 332 (1964) (dissenting opinions); *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716, 724 (N.D. N.Y. 1970).

II. The Fourth Amendment reaches all intrusions by agents of the government upon the sanctity of a man's home. *Warden v. Hayden*, 387 U.S. 294, 301 (1967); *Boyd v. United States*, 116 U.S. 616, 630 (1886). Its protections apply to governmental intrusions on the privacy of individuals not suspected of criminal behavior. *See v. Seattle*, 387 U.S. 541, 543 (1967); *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967).

A. The procedure compelled by Section 78.10 of the Florida Statutes is a search and seizure within the meaning of the Fourth Amendment. It obligates an officer executing a replevin writ to enter the defendant's home or other building by force if the occupant is either absent or uncooperative. After entering the officer must explore throughout the premises until he finds the personal property described in the writ. This property is then seized and removed. The defendant is given neither advance notice of nor the opportunity to withhold consent to the intrusion,

exploration and resulting seizure and removal of property which may be vital to his welfare. Attempted resistance exposes the defendant to criminal and civil liability. Fla. Stat. §§ 843.01, 843.02, 78.071 (1969).

B. Individual privacy may be subordinated consistent with the Fourth Amendment to governmental intrusions found to be reasonable. The reasonableness of any intrusion should be determined by balancing the public's need to intrude against the infringement of individual privacy occasioned by that intrusion. *Camara v. Municipal Court, supra* at 536-37. Readily available alternatives must also be scrutized to determine whether other methods that accomplish the same public goals with less infringement on privacy exist. See *Wyman v. James*, 91 S.Ct. 381, 388 (1971).

The Florida replevin procedure measured by this formula is an unreasonable search and seizure. It implements no compelling public interests. It needlessly inflicts a callous, sweeping and potentially severe injury to individual privacy. It affords no advance notice and has no time limitations. Moreover, it requires a virtually unlimited intrusion upon the privacy of individual homes with authority to use force whenever necessary. Fla. Stat. § 78.10 (1969).

The decision to intrude under the Florida replevin procedure is made by the replevying plaintiff's attorney and does not receive prior judicial approval. The procedure is thus unconstitutional pursuant to the general rule that all governmental intrusions into private property conducted without prior approval of a judicial authority are unreasonable. *E.g., Mancusi v. DeForte*, 392 U.S. 364, 370 (1968); *See v. Seattle, supra* at 543.

The recent decision in *Wyman v. James, supra*, is an exception to this rule and illustrates that the instant case does not merit exception. In *Wyman* the public interests were paramount, the procedures used to implement them were narrow, and all available alternatives were inadequate. None of these criteria apply to the instant case. Here there are no comparable public interests. The means used are not narrow.

Finally, the alternative of providing notice and an opportunity to defend prior to seizure is readily available.

C. There was no consent to the invasion of privacy here when the replevin writ was executed and, for the reasons advanced previously, nothing in the conditional sales contract effected an intelligent and intentional abandonment of a known constitutional right. See *supra* at 7.

ARGUMENT

I

THE FLORIDA REPLEVIN STATUTES AUTHORIZE THE SEIZURE OF PROPERTY WITHOUT NOTICE AND HEARING IN VIOLATION OF THE DUE PROCESS CLAUSE OF THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION.

A. Absent an Extraordinary Situation Involving Valid State Interests, Due Process Requires Notice and a Prior Hearing.

The Fourteenth Amendment to the United States Constitution provides that no one shall be deprived of "life, liberty or property without due process of law." In a recent case, Justice Harlan summarized the procedural mandates of this clause as follows:

> [The] root requirement [of due process of law is] that an individual be given an opportunity or a hearing *before* he is deprived of any significant property interest, except for extraordinary situations where some valid governmental interest is at stake that justifies postponing the hearing until after the event. *Boddie v. Connecticut*, 91 S.Ct. 780, 786 (1971) (emphasis in the original).

This statement reiterates a long established doctrine that goes to the heart of appellant's due process claim: no one may be deprived of property by state action unless he is first given notice and an opportunity to be heard. *Bell v. Burson*, 39 U.S.L.W. 4607, 4609 (May 24, 1971); *Goldberg*

v. Kelly, 397 U.S. 254 (1970); *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969); *Shroeder v. New York*, 371 U.S. 208 (1962); *Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123 (1951); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950); *Coe v. Armour Fertilizer Works*, 237 U.S. 413 (1915); *Londoner v. City of Denver*, 210 U.S. 373 (1908); *Windsor v. McVeigh*, 93 U.S. (3 Otto) 274 (1876). *See also Armstrong v. Manzo*, 380 U.S. 545 (1965); *Grannis v. Ordean*, 234 U.S. 385, 394 (1914).

Only the narrowest exceptions historically have been carved into these procedural requirements. For example, this Court has upheld administrative price and rent controls prior to any hearing in times of war. *Bowles v. Willingham*, 321 U.S. 503 (1944); *Yakus v. United States*, 321 U.S. 414 (1944). It has permitted the summary seizure of vitamin products or food when the public health is threatened. *Ewing v. Mytinger & Casselberry, Inc.*, 339 U.S. 594 (1950); *North American Cold Storage Co. v. Chicago*, 211 U.S. 306 (1908). It has refused to invalidate similar actions in other areas where the need to protect the public has been recognized. *Fahey v. Mallonee*, 332 U.S. 245 (1947) (conservator appointed to take possession of federal savings and loan associations); *R.A. Holman & Co. v. SEC*, 299 F.2d 127 (D.C. Cir.), *cert. denied*, 370 U.S. 911 (1962) (suspension of exemption from stock registration). And, finally, it has approved summary procedures necessitated by vital governmental functions. *Cafeteria & Restaurant Workers Union v. McElroy*, 367 U.S. 886 (1961) (dismissal of government defense employee); *Phillips v. Commissioner*, 283 U.S. 589 (1931) (collection of taxes).

The common factor in these cases upholding the invasion of property rights prior to notice and hearing has been the presence of a valid state interest.[1] As pointed out by Jus-

[1]It is noteworthy that in all of these cases the summary actions approved were initiated by the government. In the instant case, it is the creditor who sets in motion the summary seizures. While the

tice Harlan above, only in such extraordinary situations where valid state interests compel immediate action, can the requirements of due process yield. The apparent approval by this Court in *Sniadach v. Family Finance Corp.*,[2] of *McKay v. McInness*, 279 U.S. 820 (1928), and the cases cited in that opinion, *Coffin Brothers & Co. v. Bennett*, 277 U.S. 29 (1928) and *Ownbey v. Morgan*, 256 U.S. 94 (1921) does not vitiate the vitality of this general proposition. All three of these cases were concerned with attachment. The liens created by those attachments did not necessarily effect a total interruption of the owners' rights, and therefore a taking of property within the meaning of the Fourteenth Amendment may not have resulted.[3]

In addition, it is clear that in at least *Coffin Brothers* and *Ownbey* an arguably valid state interest supported the extraordinary procedures employed. *Coffin Brothers*, which dealt with an assessment on a stockholder levied by a superintendent of state banks, raised the need to protect the public following a bank failure. In *Ownbey* a state law permitting the attachment of property of a non-resident debtor provided the means to sue and recover from an absent defendant. Both cases, therefore, dealt with special situations. *Cf. Sniadach v. Family Finance Corp.*, 395 U.S. at 339. Finally, *McKay* is a per curiam decision citing only the other two cases as its authority. As there is no opinion in *McKay*, one can only speculate as to its meaning. Although the facts of the case are not clear from the opinion of the Maine Supreme Court, it appears that the case

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former acts in the interest of the public, the latter obviously serves his own private interest. The latitude to avoid the requirements of due process which the courts afford the two should differ.

[2]See 395 U.S. at 340.

[3]The property attached in these cases was real property and stockshares. In Florida, for example, *constructive* control or custody by the sheriff is sufficient to attach the property. *See In re Fuller*, 99 Fla. 1165, 128 So. 483 (1930); Fla. Stat. § 76.14 (1969); *see generally*, 3 Fla. Jur. *Attachment and Garnishment*, § 83 (1955).

involved attachment of a non-resident's property, since the court spoke of the defendant making a "special appearance." *McInnes v. McKay*, 127 Me. 110, 112 (1928). Moreover, the Maine Court, in concluding that writs of attachment were constitutional, relied heavily on the long standing practice of this procedure. As will be discussed below, such historical considerations do not support the present uses of replevin writs.

In sum, appellant submits that two hundred years of decisions by our courts leave no doubt that, in the absence of some significant state concern compelling immediate and summary action, notice and a prior hearing are constitutionally required whenever the state seeks to deprive an individual of his property interests.

B. Florida's Replevin Procedure Authorizes the Seizure of Property by the State Prior to Notice and Hearing and Is Not Justified by Any Valid State Interest.

1. *Florida's Replevin Procedure*

Under Florida's replevin statutes,[4] any person may obtain personal property held by another by filing a complaint alleging that he is lawfully entitled to the property and by posting a bond in double the value of the property claimed. Fla. Stat. §§ 78.01, 78.07 (1969).[5] Based on this allegation

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[4] Statutes similar to the ones in Florida, providing for prejudgment replevin and requiring only an allegation of right to possession, are found in 45 other states. See Section IV of the Amicus Brief filed in this case by the National Legal Aid and Defender Association, and Appendix A attached thereto.

[5] *See also* Form 1.937 of the Florida Rules of Civil Procedure, Fla. Stat. Ann., Vol. 31 (West Cum. Supp. 1971). In the instant case, appellee filed an affidavit, in addition to a complaint, alleging that it was entitled to the property. Although such an affidavit was required under prior Florida law, it is no longer required. See historical notes under Fla. Stat. Ann. § 78.05 (West 1964).

It should be noted that in Florida the person bringing the action need not be the owner of the property. The only issue to be decided

and the posting of the bond, the clerk of the court issues a writ commanding the sheriff to seize the goods described in the complaint. No notice, much less a hearing, need be or is given to a defendant under the Florida procedure. The defendant becomes aware of the claim against him when the sheriff comes for the property and "publicly demand[s] delivery" or, should the defendant be absent for any reason, when he returns home and finds that the property has been taken. Fla. Stat. § 78.10 (1969). There is no opportunity for such a defendant to protect his interest before seizure by contesting the merits of the plaintiff's claim.

This procedure bears a marked resemblance to the Wisconsin garnishment statute recently invalidated by this Court in *Sniadach v. Family Finance Corp.*, 395 U.S. 337 (1969). Here, as under the Wisconsin statute, the Florida procedure does not contain the kinds of notice and hearing "which are aimed at establishing the validity, or at least the probable validity, of the underlying claim . . . *before* . . . [one] can be deprived of his property or its unrestricted use." *Id.* at 343 (Harlan, J., concurring) (emphasis in original). The complaint here contains merely a self-serving declaration that the claimant is entitled to the property and that is the extent of the allegations necessary to put the Florida statutory mechanism in motion. As in *Sniadach*, too, it is the use of the property between the initial taking and the culmination of the suit that is of concern. Thus, the property seized may be returned if the main suit comes to trial, but in the interim the defendant is deprived of his enjoyment of the property "without an opportunity to be heard and and to tender any defenses he may have, whether it be fraud or otherwise." *Id.* at 339. Finally, and most significantly, the facts of this case, like those in *Sniadach*, fail

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in an action for replevin is the right to possession. *E.g., Parramore v. Smith*, 158 Fla. 85, 27 So.2d 670 (1946); *Security Underwriting Consultants, Inc. v. Collin Tuttle Investment Corp.*, 173 So.2d 752 (3d Dist. Ct. App. Fla. 1965); *Van Hoose v. Robbins*, 165 So.2d 209 (2d Dist. Ct. App. Fla. 1964) (dictum).

to disclose a situation requiring special protection to a state or creditor interest.

2. *No Valid State Interest Supports Florida's Replevin Procedure*

A plain reading of Florida's replevin law indicates that it is not narrowly drawn to meet any unusual situation requiring extraordinary summary procedures. The instant case shows just how indiscriminately replevin can be used.

There is no allegation here, for example, that the property held by the appellant was about to be destroyed or misused, or that the appellant intended to convey it fraudulently or abscond from the state.[6] In essence, there is no allegation that a situation exists necessitating immediate action to avoid inevitable injury to the replevying plaintiff. The present case involves no more than an ordinary dispute between private parties, and it is difficult indeed in this case to find any overriding governmental or public interest that justifies dispensing with the usual procedures required by due process. The state may have a valid interest in seeing that debts are promptly paid or that rights arising under a contract are effectively enforced. *See Epps v. Cortese*, ___ F. Supp. ___, (Civ. Act. No. 70-2592, E.D. Pa., March 31, 1971), *prob. juris. noted*, 39 U.S.L.W. 3520 (May 24, 1971) (upholding the constitutionality of Pennsylvania's replevin law). But generally contract rights must first be judicially determined before the assistance of the state may be invoked for their enforcement. And no evidence of any kind suggests that creditors such as FIRESTONE would be left without adequate remedies if prevented from utilizing these summary procedures.[7] As the Northern District of New

[6]These are examples, however, of allegations required in Florida to obtain a writ of attachment. Fla. Stat. §§ 76.04, 76.05 (1969). *See generally* 3 Fla. Jur. *Attachment and Garnishment*, § 57 (1955).

[7]*See Epps v. Cortese, supra.* If there is a valid public interest in speedy repossessions to avoid deterioration of the goods in the hands

York concluded in holding New York's replevin law unconstitutional, *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716, 724 (1970), the governmental interest under these circumstances is certainly elusive, since one might suppose that it "should encompass the welfare of the alleged debtors and consumers, as well as creditors."

In fact, the present day commercial use of writs of replevin is historically anomalous. At common law replevin writs were used to seize property claimed to have been wrongfully taken. H. Wells, The Law of Replevin §46 (1880); B. Shipman, Handbook of Common Law Pleading 120 (3d ed. 1923); F. Maitland, The Forms of Action at Common Law 48 (1965); *Simmons v. Williford*, 53 So. 452, 453 (Fla. 1910); *Troy Laundry Machinery Co. v. Carbon City Laundry Co.*, 27 N.M. 117, 196 P. 745, 746 (1921). Originally the writ was employed solely by the feudal tenant to test the legality of his lord's distress. T. Plunkett, A Concise History of the Common Law 364-69 (1936). Where, as here, a claim was made that goods or chattels were being unlawfully *detained*, the common law action brought for obtaining possession was detinue, not replevin. B. Shipman, *supra* at 118. Detinue, unlike replevin, however, was an action in the nature of a rule to show cause, commanding the defendant to appear and give his reasons why the property should not be delivered to the claimant. 26A C.J.S. *Detinue* §8 (1956); *Miller v. Townhouse Development Corp.*, 178 So.2d 730 (2d Dist. Ct. App. Fla. 1965). Absent an

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of the debtors, there are alternative procedures that could be utilized to accomplish this. *Cf. Joint Anti-Fascist Refugee Comm. v. McGrath*, 341 U.S. 123, 163 (1951) (Frankfurter, J., concurring). For example, preliminary hearings or final hearings such as those which exist in the landlord-tenant area could be made available. *See, e.g.*, Fla. Stat. Ch. 51 (1969) (defendant given 5 days to answer complaints). The state's interest in summary procedures as a means to reduce the number of hearings and therefore conserve judicial and financial resources (*see Epps v. Cortese, supra*) cannot outweigh the individual's constitutional rights. *Goldberg v. Kelly*, 397 U.S. at 263; *Shapiro v. Thompson*, 394 U.S. 618, 633 (1969).

allegation of an unlawful taking, the defendant at common law would be given notice and an opportunity to be heard.

With time, however, the nature of replevin has changed and in the statutory proceeding found in Florida today the common law distinctions between replevin and detinue have been erased. *Evans v. Kloeppel*, 73 So. 180, 182 (Fla. 1916); *Miller v. Townhouse Development Corp.*, 178 So.2d 730 (2d Dist. Ct. App. Fla. 1965); *see generally* 28 Fla. Jur. *Replevin* §3 (1968). Thus, in the instant case an allegation that the claimant was entitled to the goods was sufficient to obtain the prejudgment writ. At the same time, a parallel development has taken place in the commercial arena. Installment credit has become the means for a good part of our nation to obtain consumer goods. *See* Bureau of the Census, U.S. Dept. of Commerce, *The Statistical Abstract of the United States* 460 (90th ed., No. 664, September, 1969); Shapiro, *Installment Credit*, in 7 International Encyclopedia of Social Sciences 354-62 (1968); Skilton and Helstad, *Protection of the Installment Buyer of Goods Under the Uniform Commercial Code*, 65 Mich. L. Rev. 1465, n. 1 (1967). Ordinary necessities and items of everyday use, which in past times would have been owned outright by their users, have become subject to summary seizure under replevin procedures such as the one found in Florida. The result is that replevin today not only can be used in a manner unauthorized by the common law, but also threatens different rights and interests. A form of action that was employed to test the validity of an alleged wrongful taking has become today the means to deprive consumers of goods rightfully purchased, solely because of a belief by an alleged creditor that a default has occurred. When a procedure changes so significantly over the years, it cannot claim immunity from constitutional reexamination because of its historical antiquity. *See Sniadach v. Family Finance Corp.*, 395 U.S. 337, 340 (1969).

C. The Deprivation Suffered by Appellant Is Protected by the Due Process Clause.

The Due Process Clause has been said to protect any significant property interest or substantial right. *E.g., Boddie v. Connecticut,* 91 S.Ct. 780, 786 (1971); *Goldberg v. Kelly,* 397 U.S. 254 (1970). It has also been stated that due process protects the individual from any taking of property which is not *de minimus. Sniadach v. Family Finance Corp.,* 395 U.S. at 342 (Harlan, J. concurring).

Appellant in this case is the purchaser of a stove and a stereophonic phonograph under conditional sales contracts. The stereo was purchased last, in November, 1967, at which time the obligations for the stove and stereo were consolidated into one contract. The total of appellant's indebtedness at that time was $612.75 payable over a period of 24 months. Stipulation of Facts, A. 25. As in all conditional sales, appellant obtained the goods prior to full payment percisely because she deemed their immedate use worthy of contracting to pay finance or "handling" charges. Stipulation of Facts, A. 25. Therefore, appellant's possession at the time the property was seized pursuant to the writ of replevin was not the result of a gratuitous gesture by the seller who had retained title to the merchandise, but rather a bargained for right inherent in the nature of these contracts. In addition, appellant's right of possession and use of the property purchased under these contracts was exclusive and continuous, and could have only been defeated by a breach of her obligations to the seller. *See* Affidavit of Vincent G. Morgan, Manager of Retail Credit for Appellee FIRESTONE, A. 51.

The execution of the replevin writ resulted in appellant's total loss of the rights of use and possession which she had acquired under her contract, rights for which she had already paid approximately $400.00. Stipulation of Facts, A. 25.

Under these circumstances, plaintiff obviously was deprived of a substantial property interest.[8]

Moreover, although the loss suffered by appellant was only temporary, such a loss cannot be characterized as *de minimus*. Similar temporary intrusions of an individual's proprietory interests have been condemned by this Court recently in *Sniadach v. Family Finance Corp., supra* and *Goldberg v. Kelly, supra*. Although the court below was of the opinion that these two cases were limited to wages or their equivalent, 317 F. Supp. at 958 (A. 66), the same kinds of hardships that existed in those cases can be present where personal and household goods are summarily seized.[9]

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[8]The fact that under this transaction the seller retained title to the property does not weaken appellant's constitutional claim. Undoubtedly the Constitution protects more than the rights of owners of property. Various other kinds of rights and interests have in the past found safeguard in the requirements of notice and a prior hearing. Primary, of course, and most closely related to the instant case are the interests in the *use* of wages and welfare benefits present in *Sniadach* and *Goldberg*. Similarly, it has been held that a tenant is constitutionally entitled to a hearing prior to being evicted. *Mendoza v. Small Claims Court*, 49 Cal.2d 668, 321 P.2d 9 (1958). *See also Mihans v. Municipal Court*, 7 Cal.3d 479, 87 Cal. Rptr. 17 (1st App. Div. 1970). Other uses of property which have merited constitutional protection include easements. *See* P. Nichols, *The Law of Eminent Domain* § 5.72(1) and authorities cited therein at 105 n.2 and 107 n.3 (rev. 3d. ed. J. L. Sackman 1963). Beyond this, the observation of Justice Brennan in *Goldberg v. Kelly*, 397 U.S. at 262 n.8, would seem pertinent to this case: "Much of the existing wealth of this country takes the form of rights that do not fall within the traditional common law concepts of property. It has been aptly noted that 'society today is built around entitlement....'"

[9]In attempting to distinguish *Sniadach* from the instant case, appellee FIRESTONE has noted in prior arguments that appellant's stove was not in use at the time of the repossession and therefore no hardship could have been occasioned to the appellant. Although we do not believe that the requirements of notice and hearing are strictly limited to *Sniadach*-type situations, we would note that the stove in this case was not functioning because of the very reason that led Mrs. Fuentes to withhold her payments: the stove did not function properly. Perhaps a more compelling factual situation would have

Thus, the three-judge court in *Laprease v. Raymours Furniture Co.*, observed:

> Lack of refrigeration, cooking facilities and beds create hardships, it would seem, equally as severe as the temporary withholding of ½ of Sniadach's pay, and measured by *Sniadach*, the hardships imposed cannot be considered *de minimus*. 315 F. Supp. at 723.

And in *Hall v. Garson*, the Fifth Circuit Court of Appeals stated:

> The same kind of deep personal hardship can result from the seizure of personal and household goods as resulted from the garnishment of wages under the Wisconsin statute in *Sniadach*. 430 F.2d 430, 441 (1970).

Furthermore, where goods in every day use are summarily taken from an alleged debtor and placed under the control of his creditor's attorney, the possibility of economic leverage is by no means absent. *See generally* D. Caplovitz, *The Poor Pay More* 21, 157-67 (1965). The taking of the debtor's property may indeed often result in dubious or fraudulent claims being paid by the alleged debtor. *Laprease v. Raymours Furniture Co.*, 315 F. Supp. at 723 n. 11. The more important the item replevied is to the economic, physical or emotional well-being of the debtor, the greater the strain and the more likely that valid defenses will be

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been present here had Mrs. Fuentes depended on the stove at the time of repossession, although the other item taken, the stereo, was in use at that time. It would be ironic indeed if appellee FIRESTONE were to benefit from the fact that Mrs. Fuentes' stove was not in use, if, as she alleges, the appellee brought this result about by failing to honor its warranty. It would be even more ironic if, had the stove been operative because FIRESTONE had fulfilled its obligation to repair, the taking were to be deemed unconstitutional because of the adversity occasioned.

"relegated to the dustbin." *Klim v. Jones*, 315 F. Supp. 109, 123 (N.D. Cal. 1970).[10]

In addition, although *Sniadach* and *Goldberg* are the most recent decisions by this Court dealing with temporary takings of property, they by no means represent the only instances when this question has been before the Court. In almost all of the cases cited previously where summary invasions of property interests have been upheld (*see* section IA *supra*) the actions complained of were only of temporary duration subject to later judicial review. In finding that due process had not been violated in those cases, the Court looked to the governmental interest present in each instance, rather than relying exclusively upon the fact that the deprivation suffered was not final. For example, in *Yakus v. United States*, where the validity of administrative price fixings without prior hearings was at issue, the Court concluded:

> Our decisions leave no doubt that when justified by *compelling public interest* the legislature may authorize summary action subject to later judicial review of its validity. 321 U.S. 414, 442 (1944) (Emphasis supplied.)

Similarly, in *Phillips v. Commissioner*, it was observed:

> Delay in the judicial determination of property rights is not uncommon where it is essential that governmental needs be immediately satisfied. 283 U.S. 589, 597 (1931).

Thus, we submit that it is the presence of a compelling state interest, rather than the fact that a taking is not final,

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[10]In addition, the defendant who resists this economic coercion may still find the presentation of his case substantially prejudiced by Florida's replevin procedure. For example, where, as here, the debtor puts in issue the condition of the property seized, Florida procedure nonetheless transfers sole custody and control of this potentially critical evidence to his adversary for an indefinite period pending trial. Discovery procedures offer bare protection, if any, against the myriad possibilities of accidental or intentional alteration of this evidence.

which traditionally has been determinative of whether the requirements of notice and hearing may be obviated. As we have sought to show previously, such state interests cannot justify the existing indiscriminate use of replevin writs.

Finally, several federal and state courts, in addition to the Northern District of New York, *Laprease v. Raymours Furniture Co., supra,* have disagreed with the court below and rejected the notion that the holding of *Sniadach* is limited to wage garnishments. *See Klim v. Jones,* 315 F. Supp. 109, 122 (N.D. Cal. 1970) (Innkeeper Lien Law that does not provide for a hearing as a prerequisite to imposition of lien upon lodger who allegedly failed to pay rent held to violate due process); *Santiago v. McElroy,* 319 F. Supp. 284 (E.D. Pa. 1970) (invalidating sales under distraint procedures of Pennsylvania that do not provide for a hearing prior to the tenant being deprived of his property); *Swarb v. Lennox,* 314 F. Supp. 1091 (E.D. Pa. 1970) (voiding entry of judgment by confession against debtors without adequate understanding of their contracts); *Jones Press, Inc. v. Motor Travel Services, Inc.,* 176 N.W.2d 87, 90-91 (Minn. Sup. Ct. 1970) (statutes authorizing prejudgment garnishment of money and property without prior hearing held to violate due process); *Mihans v. Municipal Court,* 7 Cal.3d 479, 87 Cal. Rptr. 17 (1st App. Div. 1970) (voiding prejudgment writs of possesion evicting tenants without any hearing on the merits); *Westinghouse Credit Corp. v. Edwards,* No. 4067510 (Common Pleas Ct. of Detroit, Mich., Nov. 30, 1970, opinion attached as Appendix F to Appellant's Reply to Appellees Motion to Dismiss or Affirm) (Michigan Replevin law held unconstitutional in permitting seizure of property prior to notice and hearing); *McConaghley v. City of New York,* 60 Misc.2d 825, 304 N.Y.S.2d 136 (Civ. Ct. 1969) (unilateral determination by public hospital regarding patient's ability to pay held to violate due process); *Larson v. Fetherston,* 172 N.W.2d 20, 23 (Wis. Sup. Ct. 1969) (garnishment of bank accounts violates due process); *Cf. Williams v. Dade County School Bd.,* ___ F.2d ___, (No. 30249, 5th Cir., April 5, 1971); *Black Students v. Williams,*

317 F. Supp. 1211 (M.D. Fla. 1970) (invalidating student suspensions of 30 and 10 days for lack of notice and prior hearing). *Contra Epps v. Cortese*, ___ F. Supp. ___ (Civ. Act. No. 70-2592, E.D. Pa., March 31, 1971), *prob. juris. noted*, 39 U.S.L.W. 3520 (May 24, 1971); *Brunswick Corp. v. J. & P., Inc.*, 424 F.2d 100, 105 (10th Cir. 1970); *Termplan, Inc. v. Superior Court*, 105 Ariz. 270, 463 P.2d 68 (1969).

D. The Bonding Provisions of the Florida Replevin Procedure Do Not Obviate the Requirements of Notice and a Prior Hearing.

It was argued below that the provisions allowing a defendant to reclaim the seized property by posting within three days of the taking a bond in double its value, Fla. Stat. §78.13 (1969), mitigates the harsh effects of the Florida procedure. An examination of that provision will reveal the fallacies in such an argument.

This reclaiming provision is of no help to persons who do not have the financial ability to post an undertaking or acquire a surety and thus provides a remedy only for those who have sufficient wealth while denying the same remedy to the poor. Furthermore, appellant has found that while a replevin plaintiff may post a bond for as little as one percent of its total cost, the current market rate for a forthcoming bond for a replevin defendant is likely to be the full value of the property or more, even though the same person filing as a plaintiff could qualify for the lower bond fee. See Affidavit of Minnie R. Burrows, A. 4-6. Additional evidence of the ineffectiveness of this "remedy" may be seen in the fact that of 442 cases examined by appellant in the Small Claims Court of Dade County, Florida for the period from January through December of 1969, not one defendant posted the requisite bond as authorized by

the Florida procedure. See Affidavit of Jonathan P. Rose, A. at 22.[11]

Thus, the following statement of Justice Harlan concurring in *Sniadach* is equally applicable to the Florida procedure:

> From my standpoint, I do not consider that the requirements of 'notice' and 'hearing' are satisfied by the fact that relief from the garnishment may have been available in the interim under less than clear circumstances. 395 U.S. at 343.[12]

A second and closely related argument made below was that the bond required of the plaintiff in double the value of the property to be replevied is an adequate substitute for the prior hearing required in *Sniadach*, noting that in the latter case there was no bond demanded of the levying creditor. It is arguable that this security requirement may discourage the assertion of frivolous claims, although as a practical matter this is doubtful, since, as we have noted, the cost of such a bond for the replevin plaintiff is almost negligible. Such a requirement will not, however, discourage the plaintiff with a mistaken belief as to the facts or legal merits of his claim or one who fraudulently asserts his claim for whatever reason. Therefore, the act of a posting a bond cannot be construed as establishing "the validity or at least the probable validity of the underlying claims against the alleged debtor." *Sniadach v. Family Finance Corp.*, 395 U.S. at 343 (Harlan, J., concurring). Furthermore, although the security requirement may assure the defendant that if

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[11]The reclaiming provision is so little used in fact that it appears that the property is immediately handed over to the replevying plaintiff, notwithstanding the statutory requirement that the officer keep the property for three days. *See* Stipulation of Facts, A. 28-29.

[12]The Wisconsin prejudgment garnishment procedure allowed the defendant to gain a release by filing a bond executed by two sureties and in 1½ times the amount of the debt specified in the complaint, Wis. Stat. Ann. § 267.21(1) (Supp. 1970-71), and closely parallels the procedure under Fla. Stat. § 78.13 (1969).

he wins on the merits he will recapture his property or its monetary equivalent and perhaps damages for loss of use, it does nothing to protect him in the interim against the deprivation occasioned by the wrongful replevin.

Other courts that have reviewed similar situations have agreed with this position. The Supreme Courts of two states have struck down prejudgment garnishment statutes notwithstanding provisions requiring an undertaking on the part of the plaintiff, *McCallop v. Carberry*, 1 Cal.3d 903, 906 n. 7, 83 Cal. Rptr. 666, 668-69 n. 7, 464 P.2d 122, 124-25 n. 7 (1970); *Termplan, Inc. v. Superior Court*, 105 Ariz. 270, 463 P.2d 68, 70 (1969), and a California Court of Appeal has invalidated an unlawful detainer statute on due process grounds despite a plaintiff's bond requirement. *Mihans v. Municipal Court*, 7 Cal. App. 3d 479, 485-88, 87 Cal. Rptr. 17, 21-23 (1st Dist. Ct. App. 1970). And neither the district court below nor the Northern District of New York have indicated that the security posted by a plaintiff was a significant factor in either upholding or striking down a replevin statute on due process grounds. *Compare Fuentes v. Faircloth*, 317 F. Supp. 954 (A. 62), *with Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716 (N.D. N.Y. 1970).

E. In Executing the Conditional Sales Contract Appellant Did Not Waive Her Constitutional Rights.

In denying appellant relief, the court below was of the view that the contract executed by appellant was fatal to her constitutional claims. 317 F. Supp. at 958-59 (A. 66-68). This contract reads as follows:

> The undersigned Buyer agrees to pay to the Firestone Tire & Rubber Company or to its order the amount shown in Item 1 in the table at the right hereof, including any prior time payment agreements which may be incorporated herein by reference, payable as shown in said table. Until such payment has

> been made Buyer agrees that Seller shall retain title and right of possession of said merchandise; Buyer will not sell, remove or encumber and shall be responsible for all losses or any damage to said merchandise and in the event of default of any payment or payments, Seller at its option may take back the merchandise or affirm the sale and hold Buyer liable for the unpaid balance, including any delinquency or collection charge where permitted by law. Except for standard warranties the foregoing constitutes the entire agreement between the parties. Stipulation of Facts, Exhibit B, A. 34.

In the opinion of the court the critical clause of the contract is the one providing, "[I]n the event of default of any payment or payments, Seller at its option may take back the merchandise." Since the court found that appellant had admitted non-payment, it held that she could not now complain of the lack of a hearing.[13]

[13]Closely connected with this argument is the court's apparent conclusion that by admitting non-payment, appellant in essence was admitting FIRESTONE's right to possession of the property and therefore no controversey existed between the parties. 317 F.Supp. 958-59 (A. 68). That this is what the court had in mind is not clear to us, and did not seem clear to District Court Judge Eaton who assumed that the court's holding was merely that appellant had waived her constitutional rights. 317 F.Supp. at 959 (A. 68) (dissenting). In addition, the record in this case and the applicable law do not support such a conclusion. In finding that non-payment was in fact a default under the contract giving rise to FIRESTONE's right to take back the merchandise, the court cited no Florida law. The Uniform Commercial Code, however, which was in effect in Florida at the time of this transaction, would seem to authorize appellant's action in withholding payment. Fla. Stat. § 672.717 (1969); *cf.* Fla. Stat. § 672.610 (1969). And at least one modern Florida case has held that a defendant in a statutory replevin action has defenses available to him other than showing performance of conditions under the contract. *Southside Atlantic Bank v. Lewis*, 174 So.2d 470, 471-72 (1st Dist. Ct. App. Fla. 1965).

The foregoing discussion is relevant to the extent that the court needed to find an actual controversy between the parties. But, as

The conclusion reached by the court is palpably unsupportable. The language of the contract does not support even an inference of a waiver of rights. This court has stated that a waiver of constitutional rights, at the very least, must be clear and unequivocal. *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938). Certainly the language in question does not meet this standard. The contract merely describes the types of remedies available to the seller in the event of default. Were this not so, then the remaining portion of the clause quoted above which provides that the seller may in the alternative "affirm the sale and hold Buyer liable for the unpaid balance" would have to be interpreted as permitting something tantamount to a judgment by confession for money damages. It is submitted that such a result would be surprising even to FIRESTONE in this case.

What the writ of replevin then does is to enforce the contractual remedy of the seller without a prior determination that it is entitled to this remedy. And this is precisely the gist of appellant's procedural objections: the Florida statutes employed by FIRESTONE permit it to make a unilateral determination, of the kind usually reserved for the judiciary, that appellant has defaulted in her obligations. The language in question simply cannot be stretched to show appellant's agreement to these procedures.

Moreover, the parties' contract herein is a standard form agreement. These contracts, as has been widely recognized,

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the court itself recognized, appellant had steadfastly maintained that she is not in default under the contract. 317 F.Supp. at 958 (A. 66). Whether appellant's view of the substantive law is correct is a matter for the Florida courts to decide at a hearing on the merits. The action before the three judge court below concerned only the validity of the procedures in question. *See Coe v. Armour Fertilizer Works,* 237 U.S. 413, 424 (1915), where Justice Pitney stated: "To one who protests against the taking of his property without due process of law it is no answer to say that in his particular case due process of law would have led to the same result because he had no adequate defense upon the merits." *See also Williams v. Dade County School Bd.,* _____ F.2d _____, (No. 30249, 5th Cir., April 5, 1971).

are not the product of the parties' bargaining, nor do they represent a voluntary assent to the various provisions found in them. *See Henningsen v. Bloomfield Motors, Inc.*, 32 N.J. 358, 161 A.2d 69, 86-88 (1960); Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 Harv. L. Rev. 529, 530, 539-44 (1971); Kessler, *Contracts of Adhesion–Some Thoughts About Freedom of Contracts*, 43 Colum. L. Rev. 629, 632 (1943). In all probability appellant when she signed her contract was completely unaware of both the existence and the far-reaching consequences of the standardized clause stressed by the court below. Under these circumstances a waiver of constitutional rights is highly suspect. See *National Equipment Rental, Ltd. v. Szukhent*, 375 U.S. 311, 326-27, 332 (1964), (separate dissenting opinions of Black, J., and Brennan, J.); *Osmond v. Spence*, 39 U.S.L.W. 2660 (D. Del., May 13, 1971); *Laprease v. Raymours Furniture Co.*, 315 F. Supp. 716, 724 (N.D. N.Y. 1970); *Santiago v. McElroy*, 319 F. Supp. 284, 294 (E.D. Pa. 1970); *Swarb v. Lennox*, 314 F. Supp. 1091, 1100 (E.D. Pa. 1970), *prob. juris. noted*, 39 U.S.L.W. 3424 (March 29, 1971).

II

THE FLORIDA REPLEVIN STATUTES REQUIRE AN UNREASONABLE SEARCH AND SEIZURE IN VIOLATION OF THE RIGHT OF FLORIDA CITIZENS TO BE SECURE IN THEIR PERSONS, HOUSES, PAPERS AND EFFECTS GUARANTEED BY THE FOURTH AND FOURTEENTH AMENTMENTS TO THE UNITED STATES CONSTITUTION.

A. The Procedure Compelled By The Florida Statutes Governing The Execution Of A Writ Of Replevin Requires A Search And Seizure Within The Meaning Of The Fourth Amendment.

The Fourth Amendment reaches all intrusions by agents of the public upon personal privacy and security. *Terry v. Ohio*, 392 U.S. 1, 17 n. 15 (1968); *Poe v. Ullman*, 367 U.S. 497, 550-51 (1961) (dissenting opinion). It creates a zone of privacy encompassing the "sanctity of a man's home and the privacies of life." *Warden v. Hayden*, 387 U.S. 294, 301 (1967); *Boyd v. United States*, 116 U.S. 616, 630 (1886); *see Griswold v. Connecticut*, 381 U.S. 479, 484 (1965). Its protections are enforceable against the states by the Due Process Clause of the Fourteenth Amendment. *Ker v. California*, 374 U.S. 23, 30-31 (1963); *Mapp v. Ohio*, 367 U.S. 643, 655 (1961).

Recent decisions of this Court have extended the protection of the Fourth Amendment to governmental intrusions upon the privacy of individuals who are not under suspicion of criminal behavior.[14] *See v. Seattle*, 387 U.S. 541, 543

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[14]This extension draws into question the contemporary significance of *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 59 U.S. (18 How.) 272 (1856), relied on by the court below. *Murray* upheld a distress warrant authorized by act of Congress and used against delinquent collectors of federal revenue. A Fourth Amendment argument was rejected apparently because a search warrant was not a part of civil proceedings for the recovery of debts. *Id.* at 285. To the extent that this is the basis for the *Murray* decision, it has been

(1967); *Camara v. Municipal Court*, 387 U.S. 523, 530 (1967); *cf. Wyman v. James*, 91 S. Ct. 381, 384-85 (1971). In *Camara, supra*, Justice White explained this extension stating:

> It is surely anomalous to say that the individual and his private property are fully protected by the Fourth Amendment only when the individual is suspected of criminal behavior. For instance, even the most law-abiding citizen has a very tangible interest in limiting the circumstances under which the sanctity of his home may be broken by official authority, for the possibility of criminal entry under the guise of official sanctions is a serious threat to personal and family security. *Id.* at 530-31.

A Fourth Amendment search in criminal contexts contemplates an exploratory investigation for tangible items. *See Terry v. Ohio*, 392 U.S. 1, 16-19 (1968). The procedure compelled by the Florida replevin statutes is little different. Section 78.10 is the sole statute pertaining to the manner of executing a replevin writ and it provides:

> In executing the writ of replevin, if the property or any part thereof is secreted or concealed in any dwelling house or other building or enclosure, the officer shall publicly demand delivery thereof and if it is not delivered by the defendant or some other person, he shall cause such house, building or enclosure to be broken open and shall make replevin according to the writ; and if necessary, he shall take to his assistance the power of the county.

This provision obligates the officer executing a writ to make a reasonable exploration of the dwelling or other building to locate, seize and remove the personal property described on the writ. *See, e.g.*, R. Shinn, Replevin 324 (1889); H. Wells, The Law Replevin 165 (1880). If the occupant

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discredited by the recent application of Fourth Amendment protection to civil statutory schemes similarly devoid of a search warrant requirement. *E.g., See v. Seattle, supra*, (municipal fire inspections); *Camara v. Municipal Court, supra*, (municipal housing inspections).

is not at home when the officer calls, or if he refuses entry, the officer is required to enter, by breaking with whatever force is necessary,[15] and then to forage through the dwelling or building until he finds and removes the property. As here, this entry and exploration frequently involves the defendant's home because replevin is most often employed to recapture consumer goods located within a dwelling. The defendant has no advance notice of the intrusion and no opportunity to prevent the invasion of his privacy that attends the execution of the writ against him.

This Court's recent decision in *Wyman v. James*, 91 S. Ct. 381 (1971), holding that home visitation of welfare recipients was not a search, suggests that the procedure compelled by the Florida replevin statutes is indeed a search. In *Wyman* the caseworker's presence in the home was "both rehabilitative and investigative" and this Court decided that the investigative aspect was given "far more emphasis" than it deserved. 91 S. Ct. at 386. Moreover, this visitation was not compelled and the beneficiaries were free to refuse it without incurring criminal or civil liability. 91 S. Ct. at 386.

In contrast, there is no rehabilitative aspect mitigating the executing officer's presence in a Florida replevin defendant's

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[15]Proof of actual secretion or concealment of the property described on the writ in locations other than those normally expected is not required and the mere failure to produce the property after public demand has authorized entry by breaking under virtually identical statutory provisions. *State v. Pope*, 4 Wash. 2d 394, 103 P.2d 1089 (1940); *see Broomfield v. Checkoway*, 310 Mass. 68, 38 N.E. 2d 563 (1941); *Howe v. Oyer*, 5 Hun. 559 (N.Y. 1889). In *Howe v. Oyer, supra*, a forcible entry was upheld where the occupant simply was not home when the officer arrived.

In the Small Claims Court of Dade County, Florida, where the writ of replevin in the instant case issued, local practice involves issuance of a break order as a matter of course whenever entry is refused to an officer seeking to execute a writ of replevin. No additional information is required sustaining probable validity of the plaintiff's claim. However, break orders are not required by local practice for forcible entry pursuant to writs issued from either the Circuit Court or the Civil Court of Record of Dade County, Florida.

home. His presence there also goes far beyond mere investigation. He is there to dispossess the defendant and his family of tangible personal property which they may be wholly unwilling to relinquish and which may be vital to their welfare. Further, the Florida replevin procedure compels the intrusion and seizure by affording no opportunity to withhold consent. *Compare Wyman v. James,* 91 S. Ct. at 386. A replevin defendant's simple refusal to admit the executing officer to his home may be a criminal act in Florida[16] and more active resistance will likely earn a criminal charge. *See e.g., State v. Pope,* 4 Wash. 2d 394, 103 P. 2d 1089 (1940: *Commonwealth v. Temple,* 38 Pa. D. & C. 2d 120 (Centre Co. Q. S. 1965); *Commonwealth v. Valvano,* 33 Pa. D. & C. 128 (Lackawanna Co. Q.S. 1936). Moreover, any refusal to cooperate exposes a replevin defendant to a contempt of court proceeding. Fla. Stat. § 78.071 (1969).[17]

Finally, Florida replevin procedure clearly compels a seizure because the executing officer is required to take actual physical possession of tangible personal property and remove it from the defendant's premises. Fla. Stat. §§ 78.08, 78.10 (1969). This seizure differs from a criminal seizure

[16]Such an act comes within the express language of Fla. Stat. § 843.02 (1969) which provides:

> Whoever shall obstruct or oppose any [sheriff, deputy sheriff, officer of the Florida Highway Patrol] . . . or any personnel or representative of the department of law enforcement or legally authorized person, in the execution of legal process. . . without offering or doing violence to the person of the officer, shall be punished by imprisonment not exceeding one (1) year, or by fine not exceeding one thousand dollars ($1,000).

If violence is offered or done to the person of the officer or legally authorized person, the offense is a felony. Fla. Stat. § 843.01 (1969).

[17]This section provides:

> If plaintiff has good cause to believe that defendant is secreting or concealing property sought to be replevied or any part thereof, on motion of plaintiff the court may order defendant to deliver the property to the sheriff or show cause why he should not be held in contempt for his failure so to do.

only to the extent that the property taken by replevin writ is not ordinarily used as evidence of guilt in a subsequent criminal proceeding.[18] However, this difference is constitutionally irrelevant because "privacy is disturbed as much by a civil seizure . . . as it is by a criminal seizure." *United States v. Undetermined Quantities of Depressant or Stimuland Drugs*, 282 F. Supp. 543, 546 (S.D. Fla. 1968).

B. The Procedure Compelled By The Florida Statutes Governing The Execution Of A Writ Of Replevin Requires An Unreasonable Search And Seizure In Violation Of The Fourth And Fourteenth Amendments.

Only unreasonable searches and seizures are prohibited by the Fourth Amendment. *Wyman v. James*, 91 S.Ct. 381, 386 (1971); *Terry v. Ohio*, 392 U.S. 1, 9 (1968); *Elkins v. United States*, 364 U.S. 206, 222 (1960). Thus the right to be left alone that the Fourth Amendment guarantees may be subordinated to governmental intrusions deemed reasonable as a matter of public policy.[19] A compelling

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[18]It is not inconceivable that property seized by a writ of replevin could be used as evidence in a criminal prosecution. For example, such property would be relevant to a charge under Florida's concealing property under a lien statute, Fla. Stat. § 818.01(1) (1969).

[19]See Dixon, *The Griswold Penumbra: Constitutional Charter for an Expanded Law of Privacy*, 64 Mich. L. Rev. 197, 203 (1965); Dykstra, *The Right Most Valued by Civilized Man*, 6 Utah L. Rev. 305, 322 (1959). This concern for public policy explains those decisions permitting warrantless searches and seizures from revenue-producing licensees in heavily regulated businesses. For example, the liquor industry has received different treatment under the Fourth Amendment by virtue of Congress' zealous protection of its revenue against fraud. *E.g., Colonnade Catering Corp. v. United States*, 397 U.S. 72, 75-77 (1970). Similarly, warrantless searches under Federal Food and Drug provisions, which involve some revenue concerns but more significant public interests in protecting the public from poisonous food and drugs, have been upheld. *See, e.g., United States v. 935 Cases More or Less, Etc.*, 136 F.2d 523, 525 (6th Cir.), *cert.*

public need to intrude is prerequisite to approval of any governmental intrusion. *District of Columbia v. Little*, 178 F.2d 13, 17 (D.C. Cir. 1949), *aff'd on other grounds*, 339 U.S. 1 (1950); *see Vale v. Louisiana*, 399 U.S. 30, 34-35 (1970); *Johnson v. United States*, 333 U.S. 10, 14-15 (1948). It is only after such a public need exists that the reasonableness of a particular intrusion may be determined "by balancing the need to search against the invasion which the search entails." *Camara v. Municipal Court*, 387 U.S. 523, 536-37 (1967). Available alternatives which might accomplish the same public goals and infringe less on individual privacy should also be considered. *See Wyman v. James*, 91 S.Ct. at 388.

Wyman v. James, supra, is this Court's most recent balancing of a non-criminal governmental intrusion upon individual privacy. In that case several public interests including the protection of dependent children and the monitoring of federal and state revenues were served by the home visitation. The means used by the New York agency to implement its intrusion were narrowly drawn to emphasize privacy and forced entry was prohibited. 91 S.Ct. at 387. This Court considered and rejected as inadequate the suggested alternatives and concluded that the New York procedure was a reasonable infringement of privacy. 91 S.Ct. at 388, 390.

Applying this analysis in the instant case it is exceedingly difficult to articulate what public interests, if any, are served by the Florida replevin procedure. Neither appellees nor

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denied sub nom., 320 U.S. 778 (1943); *United States v. Eighteen Cases of Tuna Fish*, 5 F.2d 979, 980 (W.D. Va. 1925). Moreover, *Den ex dem. Murray v. Hoboken Land & Improvement Co.*, 69 U.S. (18 How) 272 (1856), relied on by the court below (A. 67), involved a compelling federal governmental interest in protecting tax revenue. The Court thus noted "that probably there are few governments which do or can permit their claims for public taxes, either on the citizen or the officer employed for their collection or disbursement, to become subjects of judicial controversy.... *Imperative necessity* has forced a distinction between such claims and all others...." *Id.* at 281-82. (Emphasis supplied.)

the court below have advanced any. In addition, the Florida procedure is not narrowly circumscribed and in no way emphasizes individual privacy. For example, this procedure gives no advance notice of the visitation and does not limit intrusions to normal working hours. *Compare Wyman v. James*, 91 S.Ct. at 387. Forcible household entry and search is not only allowed but rather authorized, and indeed compelled.[20] *Compare Wyman v. James*, 91 S.Ct. at 387.

The Florida replevin procedure authorizes a callous breach of individual privacy that is potentially more sweeping and injurious than the narrow home visit and interview approved in *Wyman*. It requires a virtually unlimited intrusion into a dwelling or other building with express authorization to use force whenever necessary. Fla. Stat. §78.10 (1969). Thus, the officer executing a writ is empowered to break not only the outer door but as many inside doors as are necessary to find and seize the property he seeks. He may use any technique necessary to gain entry.[21] The authority exists

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[20]The instant case is superficially similar to *Wyman v. James, supra*, to the extent that in both no evidence exists showing physically forced entry. However, this factual similarity is misleading because the New York procedure approved in *Wyman* did not compel consent by threat of forcible entry. Justice Blackmun there noted that if consent was withheld, "[t]here [was] no entry of the home and there [was] no search." 91 S. Ct. at 386. In contrast, Section 78.10 of the Florida Statutes commands entry by forcible breaking if consent is not immediately forthcoming. Here appellant and her relatives were told in effect that they had no legal right to resist and retain possession of the stereo before it and the stove were repossessed. Stipulation of Facts, A. 28. This Court's decision in *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968), holding non-forcible governmental entries made pursuant to a colorably lawful assertion of authority fully cognizable under the Fourth Amendment, suggests that the absence here of physical breaking should not be determinative of appellant's claim.

[21]Breakings involving broken doors, skeleton keys and broken windows have been approved under similarly worded statutes. See, *e.g., State v. Pope*, 4 Wash.2d 394, 103 P.2d 1089 (1940) (doors); *Rentschler v. Fox*, 130 Mich. 498, 90 N.W. 275 (1902) (skeleton key); *Jones v. Herron*, 1 Pa. Dist. 475 (1892) (window).

to break into and examine any cabinet, closet or other enclosure that reasonably might contain the property. And if the officer does not find the property after a thorough search of the house, he must break into any other building or enclosure which reasonably might contain it. *E.g., Rentschler v. Fox*, 130 Mich. 498, 90 N.W. 275 (1902); *compare Wyman v. James*, 91 S.Ct. at 387.

As another factor lessening the infringement of privacy in *Wyman* Justice Blackmun characterized the governmental official who made the intrusion as "a friend in need." *Wyman v. James*, 91 S.Ct. at 389. Justice Blackmun further described this official as "a caseworker of some training whose primary objective is, or should be, the welfare . . . of the aid recipient for whom the worker has profound responsibility." 91 S.Ct. at 388. By comparison, the intrusions challenged by the instant case are performed by legal process servers who are not "friends" of replevin defendants in any sense of the word. They have no responsibility to aid the replevin defendants they dispossess.[22] They may be in uniform, *compare Wyman v. James*, 91 S.Ct. at 388, and they may be accompanied by uniformed employees of the replevying plaintiff.[23] Finally, they are expressly empowered to call for assistance on any additional law enforcement personnel. Fla. Stat. § 78.10 (1969).

The procedure challenged in the instant case is additionally suspect because the decision to intrude, search and dispossess a Florida replevin defendant is made by the replevy-

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[22] Although not present in the instant case, instances of extra legal abuse and fraudulent manipulation of replevin defendants by such officers have been documented. See D. Caplovitz, *The Poor Pay More*, 161-67 (1965).

[23] For example, in the instant case, two employees of the replevying plaintiff drove a marked commercial vehicle to appellant's home and parked it in her driveway. A. 27-28. Their presence could easily contribute to community resentment, a factor that may also be considered in assessing the reasonableness of any governmental invasion of privacy. *Terry v. Ohio*, 392 U.S. 1, 17 n.14 (1968).

ing plaintiff's attorney when he decides to post a bond. There is no judicial or magisterial review of his decision. For this reason alone the Florida procedure is constitutionally infirm pursuant to this Court's mandate that subject to only a few exceptions all governmental intrusions into private property conducted without prior approval of a judicial authority are unreasonable. *See, e.g., Mancusi v. DeForte,* 392 U.S. 364, 370 (1968); *See v. Seattle,* 387 U.S. 541, 543 (1967); *Agnello v. United States,* 269 U.S. 20, 33 (1925).

The decision in *Wyman v. James, supra,* is an exception to this rule, but it is an exception explained by the analysis outlined previously, and it illustrates why the Florida procedure does not merit exception. In *Wyman* the public interests were substantial and compelling. The means used to achieve these goals were narrow and all alternative and arguably less intrusive means were held to be inadequate. Here, however, there are no comparable public interests served by the Florida replevin procedure. The means used here are anything but narrow and the alternative of allowing notice and an opportunity to adjudicate the right of possession before seizure is readily available. This approach would accomplish the same purpose now achieved and would postpone any intrusion upon individual privacy until after a judicial determination of the claims when public interests pertaining to enforcing judgments are present.

Finally, this Court in *Wyman v. James, supra,* noted that a warrant procedure possessed seriously objectionable features in the welfare context. 91 S.Ct. at 389. In a replevin context, however, a warrant procedure is applicable to the exten that additional circumstances may occasionally justify peaceful seizure of personal property without notice. For example, such a procedure could help preserve public peace by discouraging potentially violent self-help repossession attempts. These are more likely to occur in non-commercial situations involving thefts, other wrongful takings, and private loans and bailments. Prejudgment seizure may be

permitted in these instances after sufficient proof of wrongdoing or imminent destruction or concealment is presented to a judicial authority. *See* Comment, *The Constitutional Validity of Attachment in Light of Sniadach v. Family Finance Corp.*, 17 U.C.L.A. L. Rev. 837, 849-50 (1970). When property has been initially transferred in a commercial transaction public peace seems threatened only when the property is substantially or intrisically valuable and its destruction or concealment appears likely if notice precedes seizure. Retailers of consumer goods rarely encounter this situation and tend to view replevin merely as an opportunity to "salvage any value" from the property. Affidavit of Vincent G. Morgan, Manager of Retail Credit for Appellee FIRESTONE, A. 51.

Public peace is clearly not endangered when property is lawfully transferred by sale and there is no hint that it will be jeopardized or concealed if warning is given. Here appellant purchased her stove and stereo lawfully and in no way threatened to harm or hide them. The vast majority of replevins by writ employed today in Florida arise in situations identical to appellant's and seem completely unsupported by any public interest. On the other hand, the individual privacy interests infringed as a result of the intrusion wrought by implementation of the Florida procedure have been characterized as "indispensible ultimate essentials of our concept of civilization." *District of Columbia v. Little*, 178 F.2d 13, 17 (D.C. Cir. 1949, *aff'd on other grounds*, 339 U.S. 1 (1950); *see Silverman v. United States*, 365 U.S. 505, 511 (1961); *Boyd v. United States*, 116 U.S. 616, 630 (1886).

Appellant submits that a balance of these interests and available alternatives points conclusively to a judgment that the Florida procedure requires an unreasonable search and seizure in violation of the Fourth and Fourteenth Amendments.

C. Appellant Has Not Waived Her Right To Invoke the Protection Guaranteed by the Fourth Amendment.

The court below properly found no waiver of Fourth Amendment protection at the time the replevin writ was executed[24] but seemingly gave the same effect to a standard-form right of possession clause in the purchase contract that appellant signed. As noted previously, *supra* at 24-25, this clause provided simply that "in the event of default of any payment or payments seller at its option may take back the merchandise. . . ." The court below emphasized this clause and the absence of evidence of physically forced entry in concluding that "the Fourth Amendment does not prevent private parties from contracting, as the plaintiff (appellant) here did, that one may peaceably enter the other's house." 317 F. Supp. at 958-59 (A. 67-68).

This conclusion of the District Court is untenable in several significant respects. First, the court's reasoning seems misdirected because appellant does not challenge a private invasion of protected privacy but rather a state authorized and implemented intrusion pursuant to the lawful execution of a replevin writ. Second, the language of this standardized clause makes no mention of a right to enter anyone's house. Finally, for the reasons argued previously, *supra* at 24-27, this contractual provision cannot encompass an intelligent, unequivocal abandonment of a known constitutional right. *E.g., Johnson v. Zerbst*, 304 U.S. 458 (1938).

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[24]The court below noted that when Deputy Williams arrived one resident became "upset and emotional" and protested the repossession, while a second person who was speaking for appellant advised Deputy Williams that he would not relinquish the property and relented only when Deputy Williams stated that "he was obliged to repossess the stove and stereo. . . ." 317 F.Supp. at 956, quoting from the Stipulation of Facts, A. 27-28. The entry and search in the instant case were thus clearly made in the context of coercion; albeit colorably lawful coercion. *Bumper v. North Carolina*, 391 U.S. 543, 550 (1968).

CONCLUSION

In sum, appellant asserts that she has been deprived of a substantial property interest of the kind usually protected by the Fourteenth Amendment, without prior notice or the opportunity to tender any defenses. Furthermore, her property was seized by a state intrusion upon her right to be secure in her home and effects. These acts, accomplished under the summary and extraordinary procedure of the Florida Replevin statutes, violate the most rudimentary principles of our Constitution and are not justified by any valid state concern.

For these reasons, appellant respectfully requests that the decision of the court below be reversed.

Respectfully submitted,

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APPENDIX A

PROVISIONS OF THE UNITED STATES CONSTITUTION

Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

Amendment XIV

. . . [N]or shall any State deprive any person of life, liberty, or property, without due process of law; . . . .

Florida Statutes, § 78.01

RIGHT TO REPLEVIN.–Any person whose goods or chattels are wrongfully detained by any other person or officer may have a writ of replevin to recover them and any damages sustained by reason of the wrongful caption or detention as herein provided. Or such person may seek like relief, but with summons to defendant instead of replevy writ in which event no bond is required and the property shall be seized only after judgment, such judgment to be in like form as that provided when defendant has retaken the property on a forthcoming bond. . . .

Florida Statutes, § 78.07

BOND; REQUISITES.–Before a replevy writ issues, plaintiff shall file a bond with surety payable to defendant to be approved by the clerk in at least double the value of the property to be replevied conditioned that plaintiff will prosecute his action to effect and without delay and that if defendant recovers judgment against him in the action, he will return the property, if return thereof is adjudged, and will pay defendant all sums of money recovered against plaintiff by defendant in the action.

Florida Statutes, § 78.071

CONCEALMENT OF PROPERTY BY DEFENDANT; DELIVERY THEREOF TO SHERIFF.–If plaintiff has good cause to believe that defendant is secreting or concealing property sought to be replevied or any part thereof, on motion of plaintiff the court may order defendant to deliver the property to the sheriff or show cause why he should not be held in contempt for his failure so to do.

Florida Statutes, § 78.08

WRIT; FORM; RETURN.–The writ shall command the officer to whom it may be directed to replevy the goods and chattels in possession of defendant, describing them, and to summon the defendant to answer the complaint.

Florida Statutes, § 78.10

WRIT; EXECUTION ON PROPERTY IN BUILDINGS, ETC.–In executing the writ of replevin, if the property or any part thereof is secreted or concealed in any dwelling house or other building or enclosure, the officer shall publicly demand delivery thereof and it it is not delivered by the defendant or some other person, he shall cause such house, building or enclosure to be broken open and shall make replevin according to the writ; and if necessary, he shall take to his assistance the power of the county.

Florida Statutes, § 78.11

WRIT; EXECUTION ON PROPERTY CHANGING POSSESSION, ETC.–If the property to be replevied is in the possession of defendant at the time of the issuance of the writ, and passes into the possession of a third person before the execution of the writ, the officer holding the writ shall execute it on the property in the possession of the third person and shall serve the writ and summons on defendant and the third person, and the action with proper amendments, shall proceed against the third person.

Florida Statutes, § 78.12

WRIT; EXECUTION ON PROPERTY REMOVED FROM JURISDICTION.—At the time of the service of the writ if the property to be replevied is outside the territorial jurisdiction of the court issuing the writ, the officer to whom the writ is directed shall deliver it to the proper officer in the jurisdiction into which the property has been removed, and the latter officer shall execute the writ, and shall hold the property subject to the orders of the court issuing the writ.

Florida Statutes, § 78.13

WRIT; DISPOSITION OF PROPERTY LEVIED ON—The officer executing the writ shall deliver the property to plaintiff after the lapse of three days from the time the property was taken unless within the three days defendant gives bond with surety to be approved by the officer in double the value of the property as appraised by the officer, conditioned to have the property forthcoming to abide the result of the action, in which event the property shall be redelivered to defendant.